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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ———

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Columbia Broadcasting System, Inc. ("CBS") hereby petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of August 3, 1971, in *Democratic National Committee* v. *FCC*, No. 24,537, which was decided together with *Business Executives' Move for Vietnam Peace* v. *FCC*, No. 24,492, in a single opinion. CBS intervened in support of the respondents in the *Democratic National Committee ("DNC")* case, and participated as a party before the court of appeals both in briefs and oral argument.

We understand that the Federal Communications Commission and the United States are also petitioning for certiorari to review the court of appeals' decision. *FCC* v. *Business Executives' Move for Vietnam Peace; FCC* v. *Democratic National Committee.*

OPINIONS BELOW

The court of appeals' opinion, Appendix A,* has not yet been officially reported. The opinion of the Federal Communications Commission, Appendix D, is reported at 25 F.C.C.2d 216 (1970).

JURISDICTION

The judgment of the court of appeals, Appendix B, was entered on August 3, 1971. Timely petitions for rehearing were denied by an order of the court of appeals, Appendix C, entered on October 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Broadcast licensees are required under the regulatory scheme established by the Communications Act and the policies of the Federal Communications Commission to provide full and fair coverage of controversial public issues. The question presented is whether the decision by Congress and the Commission not to compel broadcasters to sell advertising time for presentation of views on such issues violates the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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* Appendices A through D are contained in a separately bound volume accompanying this petition.

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, provides:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

STATEMENT OF THE CASE

This case involves a request by the Democratic National Committee ("DNC") for a declaratory ruling by the Federal Communications Commission (the "Commission") that broadcast licensees generally must sell time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1] DNC made no claim that any licensee had failed to carry out his responsibility to present full and fair coverage of significant issues pursuant to the Commission's fairness doctrine approved by this Court in its leading *Red Lion* decision.[2] Rather, DNC sought a ruling that, even if a licensee has fully complied with the fairness doctrine, he still must sell time to "responsible entities" like DNC to present their individual views on issues they choose to discuss.[3]

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[1] App. D 1. As noted above, the Appendices are contained in a separately bound volume accompanying this petition.

[2] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[3] App. D 13-14

CBS, which is the licensee of a number of radio and television stations and which operates a radio and a television network, urged the Commission to deny the requested ruling. CBS' response[4] described in detail its policy with respect to presentation of viewpoints on public issues, which provides substantial direct exposure for partisans and partisan views, on a free basis, as part of a total professional journalistic effort.[5] In this connection CBS submitted a detailed exhibit of more than 100 pages showing the numerous partisan views on the Vietnam War issue presented on the CBS Television Network and WCBS-TV (New York City) during a six-month period.[6]

CBS pointed out that it had also adopted a related policy of declining generally to sell time for the presentation of particular views on controversial issues of public importance because it had concluded that selling time for these purposes would substantially undermine its efforts through professional journalists to provide full and fair coverage. CBS expressed particular concern that the requirement proposed by DNC would create inordinate advantages for affluent partisans, make questions of fairness and balance turn upon the accident of partisan requests for time, and result in a diminution of time available for broadcaster-initiated news and public affairs programs.

By a 6-1 vote, the Commission rejected DNC's request for a declaratory ruling. The Commission noted that there is no Commission policy that precludes licensees

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[4] The CBS response is summarized in the Commission's opinion (App. D 5-9).

[5] For example, in addition to supplying time for Presidential appearances, time is periodically provided, without charge, to leading opposition spokesmen. See *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 24,655, decided Nov. 15, 1971), involving a "Loyal Opposition" broadcast presented by CBS.

[6] App. D 6 n.3.

from selling time for the presentation of views on public issues in individual cases in which they believe it to be appropriate, so long as they also comply with their fairness doctrine responsibilities.[7] However, the Commission held that licensees are not required to sell time for the presentation of individual views. It concluded that under the statutory scheme established by Congress in the Communications Act, and approved by the decision of this Court in *Red Lion*, licensees are not "common carriers" who passively transmit the views of others, but rather are public trustees obligated to provide their listeners with full and fair coverage of controversial issues of public importance:

> "As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected." [8]

The Commission emphasized that in fulfilling that responsibility under the Commission's fairness doctrine, a licensee must present representative views; that he cannot rule out coverage of particular views because he disagrees with them; and that "partisan voices" must be included.[9] But the Commission held that a licensee who has satisfied these obligations under the fairness doctrine is not required, in addition, to sell time for the presentation of individual views. Any such requirement, the Commission held, would interfere with and undermine the fairness doctrine and the "public trustee" scheme of regulation chosen by Congress. With the elimination of licensee choice of representative spokesmen and significant issues, "the public's agenda for discussion of public issues would then be set substantively and increasingly

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[7] App. D 18.

[8] App. D 21. See also App. D 16.

[9] App. D 12.

by the affluent—by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media. . . .' " [10]

On the same day that it denied DNC's request for a declaratory ruling, the Commission also rejected by a 6-1 vote a specific complaint against a radio station (WTOP (AM), Washington) for refusing to sell "spot" advertising time [11] to present the views of an organization opposing the Vietnam War. *Business Executives' Move for Vietnam Peace ("BEM")*, 25 F.C.C.2d 242 (1970). As in *DNC*, BEM's claim was basically that the First Amendment required the station involved to sell BEM time for the presentation of its individual views, even though the station had fully complied with its fairness doctrine obligations with respect to the Vietnam War issue.[12] The Commission rejected the claim, relying in large part on its *DNC* opinion.

On petitions for review of the Commission's *DNC* and *BEM* decisions, a divided panel of the court of appeals reversed the Commission in both cases.[13] Judge Wright, for the majority of the court, held that the Commission

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[10] App. D 16, quoting *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 405 F.2d 1082, 1102 (1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969). In his dissent, Commissioner Johnson urged the adoption of an even broader requirement for the sale of time than suggested by DNC. App. D 27-40. Recognizing that an individual right to purchase time might well be incompatible with the fairness doctrine, Commissioner Johnson suggested that the fairness doctrine be suspended, if necessary, to make the new requirement feasible. App. D 35.

[11] Advertising time is sold by broadcasters in short "spot" time segments, typically of one minute or less.

[12] BEM included a vague charge of violation of the fairness doctrine in its complaint to the Commission, to which the station responded by extensively documenting its coverage of views opposed to the Vietnam War. The Commission held that BEM had failed to sustain its burden on the fairness doctrine complaint, and the court of appeals did not reach that issue. App. A 6.

[13] Jurisdiction of the court of appeals was based upon Section 402(a) of the Communications Act, 47 U.S.C. § 402(a).

must under the First Amendment require broadcast licensees who sell time for the presentation of commercial product announcements to sell advertising time as well to individuals or organizations seeking to present their particular views on controversial public issues.[14]

Attempting to come to terms with the fact that not all who seek to speak over a given broadcast facility can be accommodated, the court of appeals majority held that the new First Amendment right which it had created was a limited, "abridgeable" right.[15] Reasonable limitations may be imposed, Judge Wright indicated, upon the total amount of advertising time to be sold for such purposes and on the amount of time to be sold to a single individual or group or to representatives of a particular viewpoint.[16] But he made clear that in the court's view the Commission could not permit licensees to exercise their traditional journalistic role of selecting the particular issues and contrasting viewpoints to be presented. The individual constitutional right to purchase time for "editorial advertisements" applies, under the court's opinion, even if there is no suggestion of lack of compliance with the Commission's fairness doctrine; even if the issue on which the person or group seeks to speak is one that has been fairly covered by the licensee or is of minimal interest or importance; even if the licensee has already presented without charge the views of the person or group seeking to purchase time or believes that some other person or group is a more appropriate spokesman for the particular views sought to be discussed; and, apparently, even if the licensee deems the material sought to be pre-

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[14] The court of appeals' holding does not apply to program time —time devoted by broadcasters to more lengthy presentation of entertainment, news, public affairs and other non-commercial material. See, *e.g.*, App. A 18-19, 35.

[15] App. A 21.

[16] App. A 36-38.

sented to be unduly inflammatory, offensive, or otherwise unsuitable for broadcasting into the home.[17]

The court remanded the cases to the Commission to "develop reasonable regulatory guidelines," [18] applicable to the entire broadcast industry, governing the sale of spot advertising time for the presentation of views on controversial issues.

Judge McGowan dissented, expressing concern that the new First Amendment right created by the court would undermine the public's right to be informed which this Court held to be central in *Red Lion*.[19] The present regulatory system, requiring licensees "to advance the public's right to know" through full and fair coverage of controversial issues was deliberately chosen by Congress, Judge McGowan pointed out, and "has never been thought to be other than within the permissible limits of constitutional choice." [20] The majority's holding, Judge McGowan emphasized, would place a "constitutional straitjacket" on the Commission,[21] requiring it to scrap the present regulatory system provided by Congress for one "in which money alone determines what issues are to be aired, and in what format." [22]

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[17] App. A 21-25, 28-30.

[18] App. A 40.

[19] App. A 41-44.

[20] App. A 43.

[21] App. A 44.

[22] App. A 43.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided an Important Constitutional Question Which Has Not Been, But Should Be, Resolved by This Court.

In its decision in this case, the majority of the court of appeals has promulgated a novel constitutional doctrine with far-reaching implications for all broadcast licensees and all broadcast journalists. The court of appeals' decision requires Congress and the Commission to remove the licensee from his traditional position of responsibility and accountability as trustee for the public interest. It forces Congress and the Commission to require the licensee to share the basic responsibility to determine the manner in which public issues will be presented with private individuals and groups who have no duty to serve the public and who do not necessarily have any qualifications other than the ability to pay.

Thus the court of appeals has held that the regulatory scheme governing broadcasters developed by Congress and the Commission over the last four decades, and upheld by this Court in its landmark *Red Lion* decision, is constitutionally insufficient, and that the First Amendment can be satisfied only by the creation of a new right to purchase advertising time to present individual views on public issues. If left standing, this decision will inevitably undermine the public's right to be fully and fairly informed which is at the heart of the existing regulatory scheme.

In establishing that scheme of regulation, Congress chose to deal with the problem of limited frequencies, not by making broadcasters common carriers, but rather by setting up a system of licenses subject to periodic renewal, under which licensees are made accountable to the Commission for the operation of their facilities "in the public interest, convenience, and necessity."[23] Con-

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[23] *Red Lion*, 395 U.S. at 375-77; *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Section 3(h) of the Communi-

gress, acting to promote the First Amendment, wisely chose to intrude as little as possible into the workings of a free broadcast press and to assure that licensees fully serve the interest of the public in receiving full and fair coverage of controversial issues of public importance. In that critical area, the central regulatory vehicle for ensuring that licensees serve the public interest has been the fairness doctrine. That doctrine, first set forth in detail in the Commission's *Report on Editorializing by Broadcast Licensees* in 1949,[24] was incorporated into the Communications Act by Congress in 1959,[25] and upheld by this Court in *Red Lion*.

The fairness doctrine, this Court has noted, imposes "a twofold duty" on licensees. "The broadcaster must give adequate coverage to public issues . . . , and coverage must be fair in that it accurately reflects the opposing views." *Red Lion*, 395 U.S. at 377. As the Commission made clear in its opinion in this case, this duty may not be carried out by licensees in a bland fashion, with all viewpoints filtered through the licensee himself. Rather, licensees must present "representative community views and voices" on public issues and "some of the voices must be partisan."[26] In short, they must provide their listeners with a robust presentation of competing views on the issues of the day.

But the hallmark of the fairness doctrine is licensee responsibility, and its touchstone is the public's right to know. Thus, the Commission has always made clear that an individual does not have a personal right to make a

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cations Act, 47 U.S.C. § 153(h), expressly provides that licensees shall not be deemed common carriers. And the legislative history of the Act shows that this represented a fundamental policy choice by Congress. See App. D 14-15.

[24] 13 F.C.C. 1246 (1949).

[25] 73 Stat. 557 (1959), amending Section 315 of the Communications Act, 47 U.S.C. § 315. See *Red Lion*, 395 U.S. at 381-85.

[26] App. D 12.

broadcast presentation of his views on a particular issue. His request to do so (whether on a paying or non-paying basis) may be rejected by a licensee on the ground that the subject in question is trivial or not of significant public interest; that the views in question have already been presented through the appearance of some other individual or covered by the licensee in some other fashion; or that the licensee believes some other person could more appropriately present the point of view in question.[27]

The informed decision of Congress and its expert administrative agency to reject a common carrier approach and to leave to broadcasters maximum journalistic freedom [28] is fully consistent with the First Amendment. This decision by Congress, which has always been thought to be "within the permissible limits of constitutional choice," [29] should not lightly be frustrated. Certainly the First Amendment should not be distorted in a manner that would permanently handicap Congress and the Commission in dealing with a dynamic and delicate area of regulation and that would severely frustrate the basic purposes of that constitutional guarantee.

As this Court stated in *Red Lion*, in view of the limited number of broadcast frequencies compared to the number of individuals wishing to broadcast, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." 395 U.S. at 388. The paramount right protected by the First Amendment is the right of the viewing and listening public to be informed:

> "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That

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[27] *E.g.*, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949); App. D 11-12.

[28] See Section 326 of the Communications Act, 47 U.S.C. § 326.

[29] App. A 43 (Judge McGowan, dissenting).

right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 390.

The existing regulatory scheme was upheld by this Court in *Red Lion* because that scheme affirmatively served this paramount interest and the purposes of the First Amendment.

The court of appeals' decision effectively rejects the view of this Court that there is no "First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Judge Wright recognized not only that there was "scant precedent" for claiming an individual First Amendment right to purchase broadcast time, but also that previous efforts to establish such a right had failed.[30] He was forced to rely on a number of lower court cases involving other forums such as municipal transportation systems and bus terminals which bear little resemblance to the broadcast press.[31] In these cases the courts forbade discrimination in the sale of advertising space between commercial advertisers and those seeking to discuss controversial issues. The court below found a similar discrimination in the refusal of broadcasters who sell time for commercial advertisements to sell advertising time for discussion of controversial issues.

The court's reliance is misplaced. A bus company has no statutory or journalistic responsibility to provide bus riders with full and fair coverage of public issues.[32] Broadcasters, however, are subject to requirements as licensees, including the obligation under the fairness doctrine to present contrasting views on significant issues. These requirements effectively preclude discrimination against controversial issue discussion and provide an important reason for treating discussion of public issues dif-

[30] App. A 11.

[31] App. A 28-29.

[32] See *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 989-90 (1967).

ferently from commercial advertising. Indeed, the new constitutional right created by the court below, which virtually guarantees that controversial issue discussion will be haphazard, is fundamentally inconsistent with the paramount First Amendment right of the public to be informed which is served by the fairness doctrine.

Judge McGowan, like the Commission, correctly perceived this inherent conflict. His dissent points out the fundamental inconsistency between the fairness doctrine, under which licensees are held accountable "to advance the public's right to know" through full and fair coverage of public issues, and a system "in which money alone determines what issues are to be aired, and in what format." [33]

It is no answer to suggest, as the court of appeals does,[34] that this conflict can be avoided through development by the Commission of "reasonable regulations" that will limit the new constitutional right. The inherent conflict recognized by Judge McGowan cannot thus be avoided, for the court, in conferring initiative and control upon those who can buy time, clearly bars Congress and the Commission from permitting licensees to exercise the responsible choice necessary to serve the public's right to be informed. It is precisely the element of licensee responsibility so central to the fairness doctrine that the court of appeals plainly excludes from the new regulatory system it requires the Commission to impose on licensees. Judge Wright makes clear that Congress and the Commission cannot permit licensees to refuse to sell spot advertising time on the ground that similar or the same viewpoints have already been fully covered; or that there are more significant issues deserving of coverage; or apparently on any ground relating to content.[35] The

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[33] App. A 43 (Judge McGowan, dissenting).

[34] App. A 4, 36, 40.

[35] App. A. 21-25, 28-30.

selection of spokesmen from among all persons and groups seeking to buy time would therefore have to be made on a first-come, first-served basis or on some other mechanical basis [36] that can only produce arbitrary results.

Thus, licensees would be replaced in their Congressionally appointed role as accountable public trustees by the haphazard choices of persons who wish to and can afford to buy time. As the Commission aptly put it, "the public's agenda for discussion of public issues" would be set "by the affluent," [37] who have neither professional journalistic responsibilities nor any statutory obligation to serve the public's right to be informed. The Commission would be forced to require licensees to devote time to views expressed in paid editorial advertisements and (under existing Commission policy) to replies to those views, often on issues that are stale and insignificant, thus diminishing the time available for treating other important issues. It is difficult to understand how the paramount right of the public to be informed is served by selling time to an individual or group to present views that have already been presented or views on a trivial issue.

The end result of the court of appeals' decision, if not reversed by this Court, will be to distort the discussion of public issues in the broadcast medium and to create an anomalous discrimination in favor of affluent partisans. In other contexts, the Government has been held to be barred from establishing criteria favoring the wealthy,[38] but here the court of appeals has held that the Government must establish a system which has exactly that purpose and effect.

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[36] See App. A 42 (Judge McGowan, dissenting).

[37] App. D 16.

[38] See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Williams* v. *Illinois*, 399 U.S. 235 (1970).

We suggest, moreover, that the course which the court of appeals has required will inevitably lead to a situation in which the Commission must itself make the judgments as to what is important, what has been covered, what should be aired and who should speak. Any mechanical allocation of time will produce results that cannot be squared with effective and reasonably informative discussion of public issues. Judgments of selection as to subjects and speakers must be made by someone. It is simply impossible to confer initiative and responsibility for such judgments on the public generally, as the court below has attempted to do. Destruction of the mechanism of license responsibility created by the Communications Act would thus leave a vacuum—one that would be filled by the agencies of government.

Consider, for example, the problem of limiting the time to be sold to any one "narrow viewpoint." The court below recognizes a need for such a limitation and states that one may be imposed.[39] At the same time, however, the court apparently feels that the judgment whether two allegedly different viewpoints are in fact identical is too subtle to be left in the hands of broadcasters, even subject to Commission review for unreasonableness.[40] Who, then, is to make the judgment? In the event of a dispute, whose decision will be controlling? Plainly, the Commission and the courts, to whom these issues would be brought, would be forced to make the decisions. Every licensee rejection of a request to purchase advertising time for the presentation of views on public issues would become an occasion for a governmental decision of constitutional magnitude; every person whose request to purchase time is denied by a licensee would have a claim that his First Amendment rights were infringed. There would be no presumption in favor of the licensee's judg-

[39] App. A 38.

[40] App. A 25, 38.

ment, as there is in principle under the fairness doctrine.[41] The burden of resolving claims of constitutional right would inevitably fall on the Commission and, ultimately, the courts.

Thus, any attempt to moderate the rigors of a mechanical allocation of time would demand an extraordinary extension of government control over speech. A course raising graver First Amendment issues would be hard to conceive.

For these reasons, we think it clear that the court of appeals has decided an important constitutional issue that should be authoritatively resolved by this Court.

II. The Decision of the Court of Appeals Is in Conflict with a Decision of the Third Circuit.

The decision below is in square conflict with a decision of the Third Circuit rejecting a claim of an individual First Amendment right to purchase time on broadcast facilities.

In *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a religious organization urged that it had a right under the Communications Act and the First Amendment to purchase time on a station for broadcast of its programs. The Third Circuit rejected the claim. It held that under the scheme of regulation established by the Communications Act, broadcasters were public trustees rather than public utilities and that "Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasters." 151 F.2d at 600. Recalling this Court's observation in the *NBC* case that "unlike other modes of expression radio inherently is not available to all," [42] the Third Cir-

[41] See, *e.g.*, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

[42] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

cuit held that plaintiffs had no First Amendment right to purchase broadcast time:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . [A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." 151 F.2d at 600-01.[43]

The court of appeals below dismissed *McIntire* as a case reflecting "a crabbed judicial view of 'state action.'" [44] This represents, we submit, a "crabbed" view of *McIntire*; for the Third Circuit's holding on the "state action" issue was accompanied by a square rejection of the First Amendment claim on its merits. This is confirmed by a recent Third Circuit decision. In *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), a case in which state action clearly was present, the Third Circuit relied squarely on *McIntire* in rejecting the First Amendment claim of an author to have his article published in the law review of a state law school. The court stated:

> "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems. . . . Nor does freedom of speech comprehend the right to speak on any subject at any time. . . .

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[43] Compare *Green* v. *FCC*, —— U.S. App. D.C. ——, 447 F.2d 323, 328 (1971), in which another panel of the District of Columbia Circuit stated that apart from political candidates who are entitled to "equal opportunities" (under Section 315 of the Communications Act), "no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom." See also *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

[44] App. A 11. Unlike *McIntire*, where the action was a private one against a broadcaster, the proceeding below involves review of a Commission order.

> As this court said in McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 1945, 151 F.2d 597, 600-601, cert. den. 327 U.S. 779, 66 S.Ct. 530, 90 L.Ed. 1007, 'True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum.' " 385 F.2d at 153.

The *Avins* decision underscores the conflict created by the decision of the court of appeals in this case with the decision of the Third Circuit in *McIntire*, and the need for this Court to resolve that conflict.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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